UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA LOUISON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-176-P-H***
	)	
FOUNDATION HEALTH FEDERAL SERVICES,	***)***	
	)	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS COMPLAINT AND COMPEL ARBITRATION

The defendant, Foundation Health Federal Services, a Delaware corporation, moves to dismiss this action alleging violations of 42 U.S.C. § 1981, 42 U.S.C. § 2000e-2, and 5 M.R.S.A. § 4551 *et seq*. (the Maine Human Rights Act), and asserting common-law tort claims of negligence and intentional and negligent infliction of emotional distress, as well as a claim for punitive damages. The defendant bases its motion on an arbitration clause found in the employment application completed and signed by the plaintiff before she was employed by the defendant. I recommend that the court deny the motion.

I. Factual Background

The plaintiff was hired by the defendant on May 13, 1996. Complaint (Docket No. 1) ¶ 6; Answer (Docket No. 2) ¶ 6. The complaint alleges that the defendant refused to transfer the plaintiff

to a different position for which she applied in the spring of 1996 due to her race and forced her to accept a less desirable position. Complaint ¶¶ 13-16. The plaintiff was later transferred from the defendant's Maine office to its Maryland office and "eventually quit her job with" the defendant, Plaintiff's Opposition to Defendant's Motion to Stay and to Dismiss and Compel Arbitration ("Plaintiff's Opposition") (Docket No. 7) at 3, although these facts are not alleged in her complaint. The fact that the plaintiff resigned on July 3, 1997 is set forth in the Affidavit of Susan Philips attached to Defendant's Motion to Dismiss Complaint and to Compel Arbitration ("Defendant's Memorandum") (Docket No. 6), at paragraph 3.

The defendant contends that the claims raised in the complaint must be submitted to binding arbitration under the terms of the employment application signed by the plaintiff. The relevant language from that document is found immediately above her signature.

> **AUTHORIZATION AND ACKNOWLEDGEMENT**
> **Please Read Carefully and Sign Below**
>
> * * *
>
> If I am employed and my employment is subsequently terminated, and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights, I and Employer agree to submit any such matter to binding arbitration pursuant to the provisions of Title 9 of Part III of the California Code of Civil Procedure, commencing at Section 1280 *et seq*. or any successor or replacement statutes. I and Employer further expressly agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief.
>
> * * *
>
> I understand that nothing contained in this application, or conveyed during any interview which may be granted or during my employment, if hired, is intended to create an employment contract between me and the company.

Employment Application, Exh. A to Defendant's Memorandum, at 4.

II. Discussion

The defendant contends that the arbitration clause in the plaintiff's application form "deprives this Court of jurisdiction over the merits of the Plaintiff's dispute." Defendant's Memorandum at 2. It also asserts that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., requires this court to compel arbitration of the claims set forth in the complaint.

The Supreme Court has held that the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 24 (1983). Statutory claims may be the subject of an arbitration agreement, including civil rights claims. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991) (claim under Age Discrimination in Employment Act); *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 144 (1st Cir. 1998) (Americans with Disabilities Act). The burden is on the plaintiff to show that Congress intended to preclude a prospective waiver of a judicial forum for the claim asserted. *Id*. at 149.

The plaintiff argues, *inter alia*, that the arbitration clause at issue is not enforceable because the form also disclaims the existence of an employment contract, the "release" of the plaintiff's right to bring suit is prospective, there is no evidence that the plaintiff knowingly and voluntarily agreed to the provision, and the provision purports to deprive the plaintiff of remedies available under the statutes invoked in her complaint. It is not necessary that the court reach any of these arguments, however, because, as the plaintiff also contends, the arbitration clause at issue is not applicable by its terms to the claims asserted in the complaint.

While the plaintiff's employment with the defendant has been terminated,[1] the language of the arbitration clause provides that, in order for it to apply, the plaintiff must also be "contend[ing] that such termination was wrongful or otherwise in violation of the conditions of employment . . . ." The complaint makes no such contention. It addresses only a failure to transfer the plaintiff to a position for which she applied during her period of employment and an alleged enforced transfer to a less desirable position, both on account of her race. There is no allegation concerning termination, wrongful or otherwise. Assuming *arguendo* the enforceability of the arbitration clause in the plaintiff's application form, the plaintiff cannot be compelled to arbitrate the claims set forth in her complaint under the terms of that clause, and the motion to dismiss must therefore be denied.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss and to compel arbitration be denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

---

[1] The plaintiff's contention that her voluntary resignation does not constitute termination for purposes of the arbitration clause, Plaintiff's Opposition at 10, and the defendant's vigorous response that "termination," not otherwise defined in the employment application form, clearly includes resignation, Defendant's Reply to Plaintiff's Opposition to the Defendant's Motion to Dismiss Complaint and to Compel Arbitration (Docket No. 8), make no difference to the outcome of the analysis here.

Dated this 17th day of August, 1998.

David M. Cohen
United States Magistrate Judge